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No. 91-1430

In The

Supreme Court of the United States

October Term, 1991

TEXACO INC.,

Petitioner,

v.

DIANA L. MASON, Individually and as Administrator of the Estate of Otis W. Mason, Deceased,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Does the award of punitive damages herein comport with due process when the remittitur of $12.5 million by the Tenth Circuit Court of Appeals, coupled with detailed jury instructions and comprehensive post-trial review by the District Court, satisfied the guidelines enunciated by this Court in *Haslip*?

2. Did the District Court and the Tenth Circuit Court of Appeals properly find that a general reversal of judgment and remand for new trial by an appellate court renders the first jury's verdict null and void in its entirety and permits all factual issues to be resubmitted to the jury upon retrial?

RULE 29.1 STATEMENT

Pursuant to Rule 29.1 of the Rules of this Court, Respondent states that the only interested persons in this proceeding are those persons listed as parties to these proceedings, their attorneys, and the entities identified by the Petitioner in its Rule 29.1 Statement in its Petition for Writ of Certiorari.

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On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF IN OPPOSITION

STATEMENT OF THE CASE

This Petition for Writ of Certiorari follows the unsuccessful appeal of Petitioner Texaco of the second jury verdict rendered against it in this fourteen year litigation. Respondent brought this products liability action as a result of the death of her husband, Otis Mason, from benzene exposure during his employment as a Coast Guard instructor.

Texaco was a purveyor of benzene in bulk and introduced the chemical into the chain of distribution, ultimately leading to Otis Mason's fatal exposure in 1974 and

death by acute myelocytic leukemia, a cancer affecting the bone marrow, in 1979. The product information provided by Texaco to its immediate purchasers contained no warnings that benzene could cause cancer or leukemia. Although Texaco had known for decades prior to Mason's exposure that benzene causes cancer at even minuscule exposures, it did not provide adequate warnings of the risk until the very eve of the second trial of this case in September, 1989.

Texaco adopted the position up to and throughout trial that any downline purchaser of its benzene could "look it up themselves" and it was therefore under no duty to disclose its knowledge of the risk of cancer from benzene exposure. No purchaser in the chain of distribution between Texaco and Otis Mason knew, or possessed the expertise to know, of the cancer hazards of benzene.

The first trial of this case resulted in a judgment against Texaco for $9 million in compensatory damages. On appeal, the Tenth Circuit Court of Appeals reversed the judgment against Texaco and issued a general remand for new trial on the ground that the District Court had erred in its jury instructions.

Texaco's position upon retrial was that it should be permitted to reopen all the evidence, add new witnesses and theories of defense, add new phantom parties for comparison of fault and obtain retrial of all damages issues, but that Respondent, Diana L. Mason, was not entitled to the same benefit and was bound by the first jury's finding that punitive damages were not warranted.

The issue of the scope of retrial following a general remand by the Tenth Circuit was exhaustively briefed by

both parties to the District Court which denied Petitioner's Motion to Exclude the Issue of Punitive Damages and permitted a new trial on all issues pursuant to the mandate of the Court of Appeals. Texaco thereupon petitioned the Tenth Circuit Court of Appeals for a Writ of Mandamus to prevent submission of punitive damages to the jury in the second trial. The Tenth Circuit denied the Petition on the ground that Petitioner had failed to show a right to relief.

The jury in the second trial once again returned a verdict against Texaco and judgment was entered for $9.025 million in compensatory damages and $25 million in punitive damages. Texaco then brought a Motion for Judgment Notwithstanding the Verdict or New Trial wherein it raised for the first time during this litigation the issue of the constitutionality of the punitive damage award.[1] Following the District Court's denial of Texaco's post-trial motions, Texaco again appealed. The Tenth Circuit Court of Appeals affirmed the judgment on the condition of acceptance of a remittitur of fifty percent of the punitive damage award by Diana Mason. Mrs. Mason has accepted the remittitur of punitive damages from $25 million to $12.5 million in the interest of concluding this lengthy and complex litigation.

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[1] At no time prior to the jury retiring to determine its verdict, did Texaco raise an objection to the punitive damage instructions on the grounds that they provided inadequate guidance to the jury to satisfy due process requirements. Based on Texaco's failure to raise a timely objection, the District Court declined to pass on the petitioner's constitutional challenge to punitive damages pursuant to *Bankers Life & Casualty Co. v. Crenshaw*, 486 U.S. 71, 108 S. Ct. at 1651 (1988). See Petitioner's Appendix 120-21a.

The first question now presented by Petitioner Texaco therefore does not accurately represent the state of the case before this Court. The issue is not whether the jury's award of $25 million in punitive damages was violative of the Due Process Clause but whether the process for assessment and review of punitive damages as a whole, including the remittitur of $12.5 million of the punitive award, satisfies the guidelines set forth by this Court in its recent decision of *Pacific Mutual Life Insurance Co. v. Haslip*, 111 S. Ct. 1032 (1991).

The second question presented by the Petitioner is the scope of retrial following general remand by the Tenth Circuit Court of Appeals. This issue has been raised, briefed, and argued in depth at every stage of this proceeding since reversal of the original judgment. Upon remand to the District Court, the Tenth Circuit directed a new trial as to all "fact-found" issues. As a result of the general remand and at Texaco's insistence, this case was truly tried anew. Texaco derived enormous benefit from the District Court's adherence to the general remand. There was no substantial similarity in the evidence presented at the first and second trial. The retrial of liability in this case produced overwhelming new evidence of conduct warranting the award of punitive damages. Both the District Court and the Tenth Circuit Court of Appeals recognized that a punitive damage claim is not an independent cause of action separate from the balance of a plaintiff's case but is part and parcel of a liability determination. Pet. App. 14a. The entire issue of liability was subject to retrial upon the general remand. Based on the overwhelming evidence that Texaco's negligent conduct was gross, willful, wanton or malicious, the Tenth Circuit

held that the District Court did not err in permitting retrial of punitive damages.

Texaco contends that "the claims, the jury instructions on punitive damages, the judge, the lawyers, and the courtroom were the same in both trials" and therefore, apparently, the jury's verdict should have been the same on punitive damages. However, the evidence determines the basis for a jury's verdict not the room in which it is presented or the persons providing it. The District Court reviewed the punitive award and found it consistent with Kansas law and the evidence based on factors consistent with this Court's appraisal of due process parameters. The Tenth Circuit Court of Appeals reviewed the punitive damages award in light of this Court's decision in *Haslip* and similarly found the standards for assessment and review of punitive damages in the present case imposed a sufficiently definite and meaningful constraint on the discretion of the jury in awarding punitive damages. The Tenth Circuit found the award was not the result of passion, prejudice or bias, but nevertheless deemed it excessive and ordered a remittitur of one-half to $12,500,000.

REASONS FOR DENYING THE WRIT

I. SUMMARY OF ARGUMENT

Certiorari should be denied in this case on the following grounds: 1) Petitioner failed to present its due process argument in a timely manner, as required by consistently applied federal practice; 2) the decision below is consistent with the decisions of this Court and

the other circuit courts of appeal; and 3) there is no urgent reason, in the context of this case, for the Court to intervene.

This case offers no new issues to review beyond those persistently brought before this Court in recent years by parties challenging punitive damage awards on due process grounds. This Court addressed the due process challenge to punitive damages no more than a year ago in the decision of *Pacific Mutual Life Insurance Co. v. Haslip*, 111 S. Ct. 1032 (1991). Despite Petitioner's protestations that *Haslip* has spawned in its wake unacceptable conflict in the circuit courts and widely disparate treatment in district courts, a reasoned evaluation of post-*Haslip* decisions reveals an evolving body of law that has at its heart a balanced appreciation and application of the tenets and guidelines enunciated by this Court in the *Haslip* decision.

The Petitioner advances the view that *Haslip* established a new federal common-law of punitive damages, one that imposes on all the States the requirement that they adopt Alabama state law as their own or stand in violation of the Due Process Clause.[2]

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[2] This anomalous view has unfortunately been given some passing support in at least one lower court which Petitioner relies on for its argument of circuit conflict. *See Fleming Landfill, Inc. v. Garnes*, 111 S. Ct. 2882 (1991) *on remand*, 60 U.S.L.W. 2417, 1991 WL 258826. However, the *Fleming* court cited with approval to Professor Schwartz who has stated that " 'The [U.S. Supreme Court has] vested responsibility in state courts to develop fair and reasonable rules and guidelines. V. Schwartz, L. Magarian, "Forming Guidelines Out of Vagueness; How State Courts Can Implement Haslip.' " Slip Op. at p. 9.

Such a view flies in the face of both the language and stated intent of this Court's opinion, as well as long-established tenets of Federalism. As all the Justices in *Haslip* acknowledged, concurring and dissenting alike, concerns of Federalism and judicial restraint counsel that this Court not dictate to the States what method and manner to adopt in order to make state law consistent with the due process objectives of giving juries appropriate guidance and providing adequate post-trial review of punitive awards. See e.g. Justice O'Connor's dissenting opinion in *Haslip*, 111 S. Ct. at 1064.

The post-*Haslip* decisions conform both to the spirit of the constraints recognized as necessary by this Court and with the recognized principles of Federalism that inform those decisions. The decision of the Tenth Circuit Court of Appeals in this case comports not only with this Court's decisions but the law of Kansas as well. Unlike the punitive damages schemes employed by many states, the law of Kansas provides specific and sound guidance to juries in making their determinations of whether punitive damages are warranted. The trial and appellate courts are thus relieved of the necessity of correcting unbridled jury discretion in rigorous post-hoc reviews in which the appellate court is called upon to substitute its own judgment for that of the jury – a situation recognized by the Fourth Circuit as implicating Seventh Amendment concerns in the context of federal diversity cases.

It is true that *Haslip* has, by necessity, been addressed in cases involving punitive damages arising since the date of that decision. This fact, however, does not necessitate a leap to the blind conclusion that the *Haslip* decision

has generated a miasma of conflict which requires resolution by this Court. The decisions composing the post-*Haslip* body of law on punitive damages offer a variety of interpretations and solutions to the issues addressed by this Court in *Haslip*. The Petitioner espouses the view that the circuit courts of appeal and state courts are mired in irreconcilable conflict on the import and interpretation of *Haslip*. On the contrary, these decisions give substance to Justice Kennedy's observation that "nonuniformity cannot be equated with constitutional infirmity." *Haslip*, 111 S. Ct. at 1055.

The abolition of state common-law in this area is neither necessary nor desirable despite Petitioner's invitation to this Court to invoke a new federal common-law of punitive damages. (An invitation declined by this Court in its earlier decision of *Browning-Ferris Industries v. Kelco Disposal, Inc.*, 492 U.S. 257, 109 S. Ct. 2909, 2922 (1989)).

This case is not the appropriate vehicle for further explication of the principles enunciated in the *Haslip* opinion, even if such explication were deemed necessary. The law of Kansas, as embodied in the instructions to the jury in this case and applied by the District Court and the Tenth Circuit in their review of the jury's award, clearly conforms to the due process guidelines expressed by this Court in *Haslip* and found present in the law of Alabama.

The Petitioner makes much of the fact that the second jury in this case found the evidence to warrant an award of punitive damages while an earlier jury did not. This fact merely exemplifies the existence of disparate evidence between the two trials not disparate outcomes. One

of the hazards of retrial, as all must well be aware, is the opportunity to increase and enhance the evidence in support of one's case, an opportunity equally enjoyed by both parties. Upon retrial, the evidence of the flagrant disregard of the risks to which Texaco exposed the public was overwhelming – evidence the jury chose not to disregard and the courts found wholly competent on appeal. As a result, Texaco was assessed punitive damages equal to its net profits for less than a week, a figure that was reduced on remittitur to a sum less than 1/6th of 1% of Texaco's net worth.

The other question presented by the Petitioner to this Court is similarly undeserving of this Court's attention. Despite Petitioner's assertion of a conflict between the Tenth Circuit and the Eighth and Fourth Circuits on the scope of retrial upon a general remand, the law of these circuits adheres to the principle long-held by this Court that "reversal of a judgment and remand for a new trial places the parties in the same position, insofar as relief is concerned, as if the case had never been tried." *Wheeler v. John Deere Co.*, 935 F.2d 1090, 1096 (10th Cir. 1991) citing *Gospel Army v. Los Angeles*, 331 U.S. 543 (1947). The District Court in this case had no more power to grant preclusive effect to the first jury's verdict on punitive damages than it did concerning the first jury's award of compensatory damages. The Tenth Circuit's affirmance of the district court's retrial of all damages and liability issues should be undisturbed.

II. KANSAS LAW ON PUNITIVE DAMAGES AS APPLIED IN THIS CASE COMPORTS WITH DUE PROCESS GUIDELINES

As observed by the Petitioner, the analysis of whether the assessment and review of punitive damages in this case comports with due process must be guided by this Court's decision in *Pacific Mutual Life Insurance Co. v. Haslip,* 111 S. Ct. 1032 (1991). In the scant year since this Court's pronouncement of due process constraints on "unlimited jury discretion," several lower courts have had the opportunity to apply the reasoning and holding of *Haslip* to the cases before them. In particular, the decisions rendered in the cases remanded by this Court to the circuits for consideration in light of *Haslip* amply demonstrate that the circuits are astute, creative and balanced in addressing due process concerns and applying *Haslip* to state common law. Rather than a morass of conflicting holdings, these cases constitute an evolving, yet cohesive, approach to ensuring that punitive awards "do not exceed an amount that will accomplish society's goals of punishment and deterrence." *Haslip,* at 1045.

The Petitioner asserts that the circuit courts have taken three different approaches to *Haslip.* In reality, the circuit courts have displayed uncommon uniformity in applying *Haslip* to the wide variety of state law schemes and factual scenarios presented to them by the cases reviewed. The approach is by a case by case evaluation of the law of each forum to determine whether each punitive damage scheme imposes "definite and meaningful constraint on the discretion of the fact-finders in awarding punitive damages." *Id.*

The "conflict" perceived by the Petitioner as requiring imposition of a uniform federal common-law standard by this Court is in reality the recognition and accommodation of the common-law of the States sought to be preserved by our doctrine of Federalism. In promoting its argument that *Haslip* has imposed on the circuits and the States a requirement that every forum must adopt Alabama's scheme of post-trial review, the Petitioner constructs a premise that the circuit court decisions can be segregated into three opposing "camps". The Petitioner then concludes that the only circuits that have appropriately applied *Haslip* are the Fourth, Eighth and Eleventh Circuits since these circuits purportedly hold that the only punitive damage schemes that satisfy due process are those that apply a rigorous post-verdict review employing the Alabama *Green Oil* criteria. (These criteria were recited in *Haslip,* 111 S. Ct. at 1045.) Petitioner's argument must fail as both its premise and conclusion are fallacious.

The Petitioner identifies the Tenth Circuit's decision in this case, as well as the Fifth Circuit's Decision in *Eichenseer v. Reserve Life Ins. Co.,* 934 F.2d 1377 (5th Cir. 1991), as forming the "camp" of cases that allegedly "ignore *Haslip* by suggesting that the deferential post-trial review for excessiveness that 'shocks the conscience' satisfies *Haslip* and due process." This premise is a gross distortion of both of these cases.

The factors identified in *Haslip* as necessary to satisfy due process concerns were considered and applied by the jury, the trial court, and the appellate court in this case.

The jury was instructed that it was not required to but may award punitive damages if appropriate. In determining whether to make a punitive award, and in what amount, the jury was further instructed to base its decision on the reasonable consideration of the following factors: 1) the purpose of punitive damages is to punish and deter like offenses by the defendant and as a warning and example to others; 2) the conduct of defendant must have possessed elements of oppression, fraud, or malice; 3) the award must bear a relationship to the injuries inflicted; 4) the nature, extent and enormity of the wrong; 5) the intent with which the acts were committed; 6) all circumstances surrounding defendant's acts; 7) the plaintiff's time and expense of litigation; 8) the defendant's financial worth may only be considered in determining what amount, if any, is consistent with the purpose of deterring defendant and others from similar acts in the future and for punishment of defendant, but it is improper to base an award solely on the wealth of a defendant; and, 9) the defendant's compliance with regulations was to be entitled to "probably conclusive" consideration as proving the lack of bad conduct necessary for punitive damages. See Pet. App. 174a-178a. As can be clearly seen, the factors identified by this Court in *Haslip* as appropriate for consideration were contained in the jury's instructions in this case.

Next, the district court conducted a post-verdict review of the punitive damage award which, pursuant to Kansas law, included assessment of the following factors: 1) the award's relationship to the actual damages sustained; 2) the actual damages awarded; 3) the circumstances of the case (i.e., the nature, extent, and enormity

of the wrong); 4) the intent of the party committing the wrong; 5) the relative positions of the plaintiff and defendant; 6) the defendant's net worth; and 7) plaintiff's probable litigation expenses. *See Folks v. Kansas Power & Light Co.*, 243 Kan. 57, 78, 55 P.2d 1319 (1988). In addition, the trial court analyzed the deterrent effect of the award and the ratio that the punitive damage award bore to compensatory damages. *See Mason v. Texaco, Inc.*, 741 F. Supp. 1472, 1515-17 (D. Kan. 1990).

As this court has repeatedly stated, the purpose and goal of punitive damages is punishment and deterrence and, to that end, a defendant's financial condition and wealth is a factor that must be considered. The jury's award of punitive damages in this case was far below the norm in its proportionality to Texaco's financial condition. After remittitur, the award was grossly disproportionate to the ratio of damages to financial worth upheld by most appellate courts as well as this Court in *Haslip*. Indeed, the ratio of compensatory to punitive damages in this case was 1 to 1.3. In light of the net worth of Texaco of $8.105 billion and annual net earnings of $1.304 billion, the typical ratio of such awards of one percent of net worth would have warranted a punitive award of around $81 million.[3] By comparison, the jury award of $25 million in punitive damages was modest indeed.

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[3] In rejecting defendant Texaco's argument that the verdict of $25 Million was excessive, the District Court stated that it "must also consider this award in light of the underlying punishment and deterrent purposes of punitive damages." It then referred to the recent survey of punitive awards by the Seventh Circuit wherein a typical ratio of 1% of net worth was found. *See Cash v. Beltmann N. Am. Co.*, 900 F.2d 109, 111 fn.3, (7th Cir. 1990), Pet. App. 117a.

Despite the satisfaction of all the criteria necessary to ensure a fair and reasonable award by both the jury and trial court, the Tenth Circuit Court of Appeals further reviewed the award for excessiveness. The Tenth Circuit concurred with the District Court's conclusion "that there was sufficient evidence in this case to justify the jury in finding that Texaco 'knowingly embarked upon a course of conduct dangerous to the public, motivated by private gain.' " Pet. App. 28a. Although the Tenth Circuit agreed that the award was not motivated by passion, prejudice or bias, it took the view that "the award was so excessive as to shock our judicial conscience." Pet. App. 29a. The Tenth Circuit applied none of the "Green Oil" factors as a rationale for its remittitur of 50% of the punitive award and apparently based its decision only on the fact that the award was a "staggering sum." Ironically, reference to *Haslip* guidelines would dictate affirmation of the award, not its remittitur.

The foregoing synopsis of the scheme for assessing and reviewing punitive damages clearly reflects that all constraints necessary to satisfy due process were applied and operated efficiently in this case. In *Haslip*, this Court issued no requirement that only post-verdict review employing the Alabama model be utilized in every state and district. Several courts have recognized the anomaly created by such a scheme to be that juries are given no guidance and appellate courts must then assume the role of fact-finders and "correctors" of the results of such standardless discretion. As observed by Justice O'Connor in her dissenting opinion in *Haslip*, post-hoc review does not cure standardless discretion – an observation shared

by several courts which have reasoned that jury instructions should be crafted to reflect due process guidelines, such as they were in this case, rather than relying on judicial review after trial to cure the aberrations of unguided discretion. *See Mattison v. Dallas Carrier Corp.*, 947 F.2d 95, 109 (4th Cir. 1991). *Eichenseer v. Reserve Life Ins. Co.*, 934 F.2d 1377 (5th Cir. 1991). *Johnson v. Hugo's Skateway*, 949 F.2d 1338, 1351 (4th Cir. 1991).

It bears repeating that *Haslip* did not purport to establish a federal common-law standard identical to the Alabama procedures.

> It needs emphasizing that *Haslip* did not hold that the procedures that it approved, devices that the Alabama courts had developed over the years, are the minimum ones that the due process clause requires. Rather, the Court was careful to say simply that the Alabama procedure is constitutional because it 'ensures meaningful and adequate review by the trial court whenever a jury has fixed the punitive damages.' *Haslip*, 111 S. Ct. at 1044.

Robertson Oil Co. v. Phillips Petroleum Co., 930 F.2d 1342, *on remand*, 779 F. Supp. 994, 996 (N.D. Ark. 1991).

This Court has recently declined to review the constitutionality of the Kansas standards pursuant to the same arguments presented in *Haslip* and by Petitioner herein. *OGilvie v. International Playtex, Inc.*, 821 F.2d 1438 (10th Cir. 1987), *cert. denied*, 108 S. Ct. 2014 (1988). This Court similarly declined to review a Kansas jury award of punitive damages for the same type of corporate conduct committed by Texaco in this case. *Woodersen v. Ortho Pharmaceutical Corp.*, 235 Kan. 387, 681 P.2d 1038, *cert.*

denied, 469 U.S. 965 (1984). More significantly, the trial court applied the same elements of review as approved by this Court in *Haslip* and which far exceeded the review standards employed in other states affirmed by the circuit courts. Indeed, the Fourth Circuit case relied on by Petitioner, *Johnson v. Hugo's Skateway,* 949 F.2d 1338 (1991), noted

> Although there is some uncertainty as to whether, to meet constitutional muster, each and every *Haslip* factor must be satisfied, we find ourselves in accord with the analysis that the Fifth Circuit conducted in its recent opinion in *Eichenseer v. Reserved Life Ins. Co.,* 934 F.2d 1377 (5th Cir.1991), finding sufficient evidence in the record to satisfy three of the seven *Haslip* factors and thus finding that 'the record in th[e] case provide[d] sufficient support for an award of punitive damages.'

949 F.2d at 1351.[4]

The only "Green Oil" factors upon which the jury was not instructed were criminal sanctions against the defendant, a factor not relevant to the present case, and

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[4] Petitioner's argument that the Fourth and Fifth Circuits are in conflict on the application of *Haslip* is therefore without merit. The *Eichenseer* decision (applying Mississippi law) has been cited with approval by not only the Fourth Circuit but the Fifth Circuit applying Texas law in *Glasscock v. Armstrong Cork Co.,* 946 F.2d 1085, 1988 (5th Cir.1991), by the Supreme Court of Appeals of W. Virginia in *Fleming Landfill Inc. v. Garnes,* 111 S. Ct. 2882 (1991) *on remand,* 60 U.S.L.W. 2417, and its reasoning echoed by the Supreme Court of Georgia in *Hospital Authority v. Jones,* 409 S.E.2d 501 (Ga.1991) and the District Court for Arkansas in the Eighth Circuit in *Robertson Oil Co., Inc. v. Phillips Petroleum Co.,* 930 F.2d 1342, *on remand,* 779 F. Supp. 994 (1991).

the profitability of the wrongful conduct. Texaco asserts that *Haslip* requires that a jury be given evidence of the profits derived from misconduct. This argument is without merit. Alabama law *prohibits* the introduction of any evidence of wealth or profits to the jury. This Court has not held that the profitability of misconduct, rather than net worth or profits as a whole, must be considered to satisfy due process. It certainly did not so state in *Haslip*. Rather, the Court stated that due process requires that the standards imposed must "provide for a rational relationship in determining whether a particular award is greater than reasonably necessary to punish and deter." 111 S. Ct. at 1045.

The standards for imposing and reviewing punitive damages are uniquely a matter of state law. *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 255 (1984). See also *Haslip* at 1043. This Court has previously declined to establish on its own a federal common-law standard and has abstained from such a course "because 'these are matters of state, and not federal, common law,' thereby suggesting that the State courts were competent to devise such a standard to complement, or gratify, due process limitations." *Alexander v. Evander*, 596 A.2d 687, 703 (Md. App. 1991), citing *Browning-Ferris Industries v. Kelco Disposal, Inc.*, 492 U.S. 257, 109 S. Ct. 2909 (1989). It should not now embark on an unprecedented intrusion on state sovereignty merely on the unsubstantiated suggestion that conflict between the circuits exists. Even were that the case, and the opinions cited by Petitioner certainly do not bear that out, no conflict exists between the Due Process Clause and the law applied in the present case.

Petitioner's primary complaint is the standards of review it alleges were used by the trial court and the Tenth Circuit of "excessiveness," "passion, prejudice, or bias" and "shocks the judicial conscience." As was detailed above, the Petitioner grossly misstates the scope of the post-trial review performed in this case. The District Court reiterated in detail how the facts of this case met the seven criteria required under Kansas law – the enormity of the wrong was revealed by the nature of the potential injury as well as the number of persons who were endangered by Texaco's conduct, the ratio of actual to punitive damages was less than 3 to 1, the injury suffered was an invariably fatal disease, Texaco knowingly risked injury to anyone of the general population who happened to be exposed to its benzene, Texaco's intent in marketing benzene without sharing its information with its purchasers permitted the inference of profit-motivated conduct, there was nearly complete dependence by purchasers on Texaco to supply information that only it actually possessed, and the jury's punitive award (before remittitur) was less than 2% of annual net worth. Pet. App. 116a-117a. The Tenth Circuit's review under the "shock the conscience" test does not render the significant constraints on the jury's discretion by the trial court's review and by the jury instructions a nullity.

The circuit courts of appeal are required to review the district court's ruling on a Rule 59 motion under an abuse-of-discretion standard. *Browning-Ferris*, 492 U.S. 257, 279. It cannot substitute new findings of fact for those of the jury. The fact-finding function is reserved to

juries alone. Fed.R.Civ.P. 38. Kansas law also allocates damage issues to juries and is constitutionally free to do so. This Court has heretofore consistently held that the federal system assigns the decisions of disputed questions of fact to the jury "under the influence – if not the command – of the Seventh Amendment . . . " *Byrd v. Blue Ridge Rural Electric Cooperative, Inc.*, 356 U.S. 525, 537 (1958). The restraint placed on federal courts by the Seventh Amendment in conducting post-verdict evidentiary hearings to review a punitive award is a fact recognized at least by the Fourth Circuit.[5]

The Petitioner contends that the Fifth and Tenth Circuit have both misinterpreted *Haslip* as requiring only some procedural assurance that the award is not a mere whim or impulse. This contention is totally without foundation by reference to the cases at issue. As is abundantly

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[5] In *Mattison v. Dallas Carrier Corp.*, 947 F.2d 95 (4th Cir. 1991), the court held that the "legitimizing constraints provided by the quasi *de novo* review process practiced under Alabama state law cannot be applied by federal courts" and the instructions to the jury must contain the due process constraints on discretion necessary to meet the standards set down in *Haslip*. The reasoning that courts should not act as correctors of insufficient jury instruction has been approved or adopted by several other courts as well. *See Hugo's Skateway*, 949 F.2d 1338 (4th Cir. 1991). *Glasscock v. Armstrong Cork Co.*, 946 F.2d 1085 (5th Cir. 1991). The use of the shock the conscience and abuse of discretion standards by federal courts has not been abolished by *Haslip*. As demonstrated by this case as well, the standard "is not nearly so vague, elastic, and subjectively visceral" as Petitioner urges. *See Robertson Oil*, 779 F. Supp. at 996. *See also Hospital Authority v. Jones*, 409 S.E. 2d 501 (Ga. 1991); *Eichenseer*, 934 F.2d 1377 (5th Cir. 1991). *Hugo's Skateway*, 949 F.2d 1338 (4th Cir. 1991).

demonstrated above, the full panoply of constraints were brought to bear on the jury's discretion in the case at bar. In *Eichenseer,* the Fifth Circuit did not hold that the only restraint on a jury's discretion was some amorphous reference to "reasonableness." Quite to the contrary, the Fifth Circuit upheld this Court's approval of the Alabama standards, but recognized if the standards were applied at the level of jury instructions, post-hoc correction would not be required and a less rigorous post-verdict review was constitutionally permissible.

> Again, [defendant] misunderstands the fact intensive nature of the due process analysis articulated in *Haslip*. The fact that the Mississippi appellate courts apply a deferential standard of review might be a significant factor in a case, for example, in which the trial court did not instruct the jury concerning the appropriate criteria for assessing an award of punitive damages. In such a case, the deferential standard of review might not act as an adequate check on the discretion that the jury would exercise in assessing damages. In the instant case, however, other procedural safeguards have controlled the discretion of the fact-finder. The district court completed a rigorous examination of the appropriateness of the punitive damages it imposed against Reserve Life, and in fact, the court applied many of the substantive standards that the Supreme Court approved in its review of the Alabama procedural process in *Haslip*: the relationship between the punitive damages award and the harm that occurred, the reprehensibility of the defendant's conduct, the 'financial position' of the defendant, the costs of litigation, etc. *Haslip,* 111 S. Ct. at 1045.

Eichenseer, 934 F.2d at 1386.

Petitioner contends that the Fourth, Eighth, and Eleventh Circuit authority stands in sharp contrast to the present case and to *Eichenseer*. However, as noted above, both the Fourth and Eighth Circuits have cited *Eichenseer* with approval.[6] The Eleventh Circuit decision in *American Employers Insurance Co. v. Southern Seeding Services, Inc.*, 931 F.2d 1453 (11th Cir. 1991), does not conflict with *Eichenseer*. Rather, the court in that case merely determined, consistent with the reasoning in *Eichenseer*, that inadequate jury instructions which pose no restraint on the fact finder's discretion require a more rigorous post-verdict review consistent with *Haslip*.[7]

The petitioner assumes that under a *Haslip* post-verdict review in the Fourth and Eighth Circuits, the awards "certainly would have been struck down." Reality must intrude. After reconsideration in light of *Haslip*, the Eighth Circuit has affirmed the jury's award in *Robertson Oil*. The court in *Hugo's Skateway* has not as of this

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[6] It is anomalous that Petitioner relies heavily on *Hugo's Skateway* as an exemplar of proper standards for establishing a punitive damages scheme. The court therein believed that federal courts were compelled to apply state law even if constitutionally deficient and to employ jury instructions applying inadequate guidelines, but must then correct the deficiencies on appellate review by applying Alabama post-verdict review procedures. *See, e.g.* 949 F.2d 1338, at 1351. Such a squandering of appellate resources when the goal is to provide sufficient guidance to the fact finder is indefensible under the authority of *Haslip*.

[7] The jury instructions at issue in *American Employers* merely stated the purpose of punitive damages and told the jury there were "no rules of thumb." 931 F.2d at 1458. The court therefore remanded to the district court for the court to assess if the award satisfied the *Green Oil* factors.

writing rendered an opinion as to whether the jury award in that case passes muster, although the circuit court certainly acknowledged the possibility that the award satisfied *Haslip*. 949 F.2d at 1352.

Finally, the Petitioner identifies but two alleged deficiencies in the instructions given the jury in the present case – that the jury was not given a precise range of punitive damages to award or a mathematical ratio to apply between compensatory and punitive damages. It suffices to say that Kansas law, as well as the law of many other states, does not require precise ratios of proportionality or establish a mathematical range of amounts that will serve to punish and deter. Each defendant must be assessed individually – a tenet apparently accepted by the Petitioner due to its approval of the *Mattison* reversal of an award for failing to take into account a defendant's poverty. *See, e.g. Southern Life & Health Ins. Co. v. Turner*, 111 S. Ct. 1678, *on remand*, 586 So.2d 854 (1991); *Robertson Oil*, 779 F. Supp. at 997 (ratio of punitive to compensatory damages of 10 to 1 did not of itself suggest excessiveness, especially in light of net worth of two billion dollars); *Glasscock v. Armstrong Cork*, 946 F.2d at 1095 (proportionality requirement is "simply a tool to help Texas courts determine when an exemplary damage award is the product of the jury's passion rather than its reason.")

This Court has certainly acknowledged that punitive damages address the enormity of the defendant's wrong "rather than the measure of compensation to the plaintiff". *Haslip* at 1042, citing *Day v. Woodworth*, 13 How. 363, 14 L.Ed. 181 (1852). In any case, a strict mathematical formula or range for setting punitive awards would defeat their very purpose of punishment and deterrence.

As Blackstone aptly observed "what is ruin to one man's fortune, may be a matter of indifference to another's." 4 W.Blackstone, Commentaries on the Law of England, *377-78 (1768).

Texaco argued that because benzene comprises only a small portion of its entire sales, benzene profits were a more appropriate measure for punitive damages. As pointed out by the trial court, under Kansas law, the amount of profit from wrongdoing is not the ceiling of punitive damage liability. *See Tetuan v. A.H. Robins Co.*, 241 Kan. 441, 738 P.2d 1210 (1987). "Otherwise, a manufacturer could continue to 'gamble' with low revenue, 'high risk' products, secure in the knowledge that any future punitive liability could always be mitigated by a compartmentalization of profits." *Mason v. Texaco, Inc.*, 741 F. Supp. 1472, 1504 (D.Kan.1990), Pet. App. 91a. Evidence of net worth or financial condition as a whole is similarly the standard in several other jurisdictions. *See, e.g. George v. International Soc'y for Krishna Consciousness*, 111 S. Ct. 1299 (1991), *on remand*, 4 Cap.Rptr.2d 473 (1992) (judgment reversed because no evidence introduced on financial status of defendant). Ironically, the Fourth Circuit, one of the circuits Texaco contends appropriately applies the *Haslip* guidelines, has reversed a punitive damage award not because the profits from the misconduct did not warrant the award but because the defendant's impoverished overall financial status was not considered. *See Mattison v. Dallas Carrier Corp.*, 947 F.2d 95 (4th Cir. 1991).

The decision of this Court in *Haslip* was case specific. The Court found "[w]e need not, and indeed we cannot,

draw a mathematical bright line between the constitutionally acceptable and the constitutionally unacceptable that would fit every case." 111 S. Ct. at 1043. Nevertheless, the Petitioner asks this Court to reconsider its *Haslip* decision and create federal common law dictating to the States a substantive law of punitive damages, including a state's allocation of judiciary functions between judge and jury, by requiring all states to adopt Alabama law wherein post-trial review of awards substitutes judicial fact-finding for that of the jury. Respondent respectfully requests that the Court once again decline this invitation.

III. THE TENTH CIRCUIT'S RULING ON THE SCOPE OF NEW TRIAL FOLLOWING GENERAL REMAND IS IN ACCORD WITH SETTLED FEDERAL LAW AND NO CONFLICT AMONG THE CIRCUITS EXISTS ON THIS ISSUE WARRANTING RESOLUTION BY THIS COURT

The Petitioner once again asserts a conflict among the circuits requiring this Court's intervention. However, the asserted conflict arises solely from Petitioner's interpretation of various circuit decisions it cites in support of its premise that the courts below erred in allowing all factual issues to be retried after the general remand by the Tenth Circuit. It is undisputed that an appellate court cannot grant relief not obtained at the district court without a cross-appeal. This tenet is the foundation for the eloquent reasoning of Justices Cardozo and Friendly cited by the Petitioner. However, this rule addresses the scope of appellate review, not the scope of new trial upon reversal of a judgment and remand for new trial. See *Morley Construction Co. v. Maryland Casualty Co.*, 300 U.S. 185

(1937) (findings may not be revised by an appellate court as being against the weight of the evidence at the instance of an appellee who has not taken a cross-appeal).

The scope of appellate relief is not at issue in this case. Rather, the Tenth Circuit adhered to the widely adopted rule that upon reversal of a judgment and a general remand "the first verdict bec[omes] null and void in its entirety." *Wheeler v. John Deere Co.*, 935 F.2d 1090, 1096 (10th Cir. 1991). In affirming the district court's adherence to the principle that "when a remand is general . . . the district court is free to decide anything not foreclosed by the mandate," the Tenth Circuit properly observed that the law of the case doctrine is solely a rule of practice and not a limit on the power of the court. See *Hicks v. Gates Rubber Co.*, 928 F.2d 966 (10th Cir. 1991). The rule has likewise long been applied by this Court. See *Sprague v. Ticonic Nat'l Bank*, 307 U.S. 161, 168, 59 S. Ct. 777, 780 (1939). See also 1B *Moore's Federal Practice*, Paragraphs 0.404[4.3] at 131 and 0.404[10] at 172-74 (2d ed. 1988).

The Petitioner concedes that the Tenth Circuit's ruling in this case is wholly consistent with the decisions of the Seventh Circuit and the Federal Circuit. Further, the above discussion demonstrates that the law of these three circuits are also consistent with the precedent of this Court. As the following review of the cases cited by Petitioner as conflicting with the above authority reveals, the only conflict that exists among these decisions are on their facts and not in the law adopted and applied to them.

Petitioner has repeatedly relied on the authority of *Arnold v. Eastern Air Lines*, 681 F.2d 186 (4th Cir. 1982),

cert. denied, 460 U.S. 1102 (1983) for its argument that the Tenth Circuit could not remand the case to the District Court for new trial on all factual issues absent a cross-appeal by Respondent. However, this case is totally inapposite to the case at bar and Petitioner's argument ignores the patent dissimilarities between the two trials of this case.

The *Arnold* decision does not address whether an appellee's failure to appeal an adverse jury finding of fact precludes resubmission of that factual issue after a general remand for new trial. The only "authority" for Petitioner's argument is, in reality, merely language in a footnote bearing no resemblance to the case at bar. First, the defendant in *Arnold* admitted liability. The only issue appealed was the amount of compensatory damages which the jury awarded in a lump sum for all elements of damage. After trial, the trial court determined it had committed error by permitting the jury to consider pain and suffering as an element of damages. In an attempt to correct its error, the trial court remitted a portion of the compensatory damages. The Court of Appeals reversed for new trial solely on the basis that remittitur was an improper device for correcting a perceived error in the jury's charge. The most significant fact that distinguishes *Arnold* from the present case is that the Court of Appeals issued a limited mandate specifically ordering new trial on the amount of the compensatory award alone. No such specific or limited mandate was issued in this case and *Arnold* is therefore easily distinguishable.

The Tenth Circuit ordered a new trial on all "fact-bound" issues without limitation and held on appeal that liability and damages, both compensatory and punitive,

were fact issues for jury determination and the trial court therefore did not abuse its discretion in ruling that all issues of liability and damages were matters for the jury. Pet.App. 11a.

The "law of the case" doctrine simply does not apply where the evidence on retrial is "substantially different" than that presented at the original trial. *See Gertz v. Robert Welch, Inc.*, 680 F.2d 527 (7th Cir. 1982). As observed above, the evidence adduced at the second trial so substantially and significantly varied from the first as to prevent meaningful comparison. In such a posture, the trial court properly permitted the factual issue of whether Texaco's degree of misconduct warranted punitive damages to be considered by the jury.

The other opinions cited by Petitioner are equally unilluminating on the issue as they, as well, are inapposite on the facts or the procedural posture of the cases before each circuit. *Laffey v. Northwest Airlines*, 740 F.2d 1071 (D.C.Cir. 1984) was a complex Title VII and Equal Pay Act case in which the defendant airline sought to object to the trial court's formula for calculating back-pay on a second appeal, although it had not appealed the formula used on its first appeal. The Court of Appeals properly held that a defendant could not obtain appellate relief on a claim it had not raised on its first appeal. Once again, this case involves the scope of appellate review rather than the scope of a new trial after a general remand. *See also, Alioto v. Cowles Communications, Inc.*, 623 F.2d 616 (9th Cir. 1980).

The case of *Bethea v. Levi Strauss & Co.*, 916 F.2d 453 (8th Cir. 1990), is equally unavailing to Petitioner's cause.

In *Bethea* the Circuit Court reversed in part and affirmed in part a district court's judgment, then directed that the district court enter judgment in conformity with the mandate. No new trial was ordered. On remand, the district court reconsidered a prior ruling and awarded the plaintiff additional relief beyond the original judgment. The Eighth Circuit reversed, noting that a district court is bound to strictly obey the mandate and cannot reexamine issues settled by a higher court. Significantly however, this case also held, consistent with Tenth Circuit authority, that if substantially different evidence is introduced on retrial, the district court is not bound to follow its decisions in an earlier proceeding. 916 F.2d at 456. *See also Lindsey v. American Cast Iron Pipe Co.*, 810 F.2d 1094 (11th Cir. 1987).

The remaining cases which allegedly conflict with Tenth, Seventh, and Federal Circuit authority are similarly inapposite. *See Washington Post Co. v. HHS*, 865 F.2d 320 (D.C.Cir. 1989) (appellate court issued a limited mandate with directions to determine only one specific factual issue); *Habecker v. Clark Equipment Co.*, 942 F.2d 210 (3d Cir. 1991) (Third Circuit reversed because district court took too restrictive a view of the scope of new trial after remand, noting that a trial court is free to consider any issues not expressly or implicitly disposed of by the appellate decision). As can readily be seen, the purported conflict among the circuit courts evaporates upon reference to the opinions themselves and the evaluation of the context in which their holdings were made.

Both the Tenth Circuit Court of Appeals and the District Court in this case recognized that "punitive damages are inextricably interwoven with the issue of

liability," is not an "issue separate from the balance of plaintiff's case," and therefore when the entire issue of liability and damages are subject to retrial, punitive damages must be retried as well. See Pet.App. 14a, 66a-67a.[8]

Based on the foregoing recitation and examination of circuit authority, it is evident that the Tenth Circuit opinion in the present case is not inconsistent with authority prevailing in any other circuit. Further, the decision of the courts below are well-grounded in the facts, the law and reason. Texaco decries the potential fate of litigants who prevail at trial only to lose on appeal if the judgment in this case is allowed to stand. However, the Respondent prevailed at trial in this case *on the evidence.* The evidence at the second trial was substantially altered at the behest of Texaco and also at its peril. It should not now be heard to complain as to the result because the jury weighed the evidence and found Texaco's conduct badly wanting.

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[8] Petitioner argues that punitive damages are a "unitary" issue that can be tried separately. This argument is contrary to prevailing law. See *McDonald v. Johnson & Johnson,* 722 F.2d 1370, 1388 (8th Cir. 1983), *cert. denied,* 469 U.S. 870 (1984). Following this Court's decision in *Haslip,* this issue has arisen in at least one of the cases remanded for reconsideration in light of that opinion. The court in *Hutchinson v. Stuckey,* 952 F.2d 1418, 1422 (D.C. Cir. 1992), held "when a new trial is ordered on actual damages, the question of punitive damages should also be retried [citation omitted]."

CONCLUSION

For the reasons stated above, Diana L. Mason respectfully requests that this Court deny the Petition For Writ of Certiorari to the Tenth Circuit.

Respectfully submitted,

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